No. 4486

IN THE

United States Circuit Court of Appeals

FOR THE NINTH DISTRICT

LAWRENCE MONZETTI, PETE GAIDO,
BATT TAMIETTI, JOHN PAGLEERO
and FRANK TAMIETTI,

Cross-Plaintiffs in Error

vs.

CRYSTAL COPPER COMPANY,
a Corporation,

Cross-Defendant in Error

CROSS DEFENDANT IN ERROR'S BRIEF

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MURPHY-CHEELY, PRINT

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CROSS DEFENDANT IN ERROR'S BRIEF

We respectfully contend that the alleged errors assigned in cross-plaintiffs in error's brief should not be considered at all by this court unless this court shall first find:

I.

That the cross-plaintiffs' in error were a mining co-partnership.

II.

That they were operating under a lease and not a license.

III.

That there was a breach of contract adequately pleaded and proved so as to entitle the cross-plaintiffs' in error to judgment for loss of prospective profits, proximately resulting from the alleged breach.

IV.

That the judgment now before the court should be affirmed as to Gaido and Tamietti.

Cross-plaintiffs' in error's assignments will be briefly discussed in the order in which they are presented their brief.

ASSIGNMENTS 1, 2, 3, 4, 5, 6:

It is contended the release (exhibit N) was not pleaded in defendant's answer, and was therefore not within the issues of the case.

We concede the general rule to be that a release of a cause of action frequently presents the issue requiring an affirmative plea by way of answer and the release presupposes that plaintiff has surrendered a valid right or cause of action for a valid consideration. If Monzetti was not a member of a mining co-partnership and operating with his colleagues under a license then he was not harmed by the action of the court in admitting the exhibits in evidence for the very evident reason that no cause of action existed in his favor against the company.

However, conceding the general rule to be as above

stated, plaintiff must take advantage of his rights in order to preclude testimony of the character complained of. At the trial no objection was made to the reception of the Exhibit, because the pretended release of Monzetti was not pleaded. There was only a general objection (Trans. 101-102.) But counsel for Monzetti after the exhibt was introduced in evidence moved to strike it with other exhibits upon the ground among others, that no release was pleaded in the answer.

(Trans. 179-180.)

The motion came too late. Counsel was not at liberty to include other grounds of objection upon their motion to strike.

> "When a party sits by at a trial and allows evidence to be introduced without objection, he cannot thereafter assert that the court was in error in refusing to strike it out. 'Yoder v. Reynolds, 28 Mont. 183, 72 Pac. 417; Poindexter & Orr Livestock Co. v. Oregon Short Line Ry. Co., 33 Mont., 338, 83 Pac. 886; Bean v. Missoula Lumber Co., 40 Mont., 31, 104 Pac. 869; State v. Rhys, 40 Mont. 131, 105 Pac. 494; Sate v. Van, 44 Mont. 374, 120 Pac. 479.) The rule announced in these cases applies here. The permission of the court given at the time the ruling was made that the evidence was admissible, to later move to strike it out, did not warrant the assumption by counsel that they were at liberty to include other grounds of objection when they came to make the motion."
>
> Genzberger v. Adams, 62 Mont. 430.

The reception of these exhibits cannot be said to have been introduced for the purpose of avoiding any pretended cause of action of Monzetti for the company never confessed that he had any cause for action whatsoever. Exhibit "N" is in the nature of an admission upon Monzetti's part that he had no cause of action against the company hence they tende to destroy his claims.

Under the rules of pleading prevailing in the Montana jurisdiction, we think the exhibts were admissible under the general denial.

> "It logically follows that under his general denial the defendant may introduce any evidence which tends to controvert any fact material to plaintiff's case and if he is successful in overcoming the prim facie case disclosed by plaintiff's evidence, as a whole, or in any particular, or in establishing an equipoise in the proof, he is entitled to a verdict. (Ency. Pl. & Pr. 871; De Sando v. Missoula L. & W. Co.., 48 Mont. 226, 136 Pac. 711; Stephens v. Conley, 48 Mont. 352, Ann. Cas. 19159, 958, 138 Pac. 189.) These rules apply to all actions, whatever their nature for the provisions of the Codes on the subject of pleadings cited supra, furnish the exclusive guide as to what pleadings are required or are permitted in this jurisdiction. As applied to an action on a contract resting in parol, the plaintiff must allege the contract upon which he seeks to recover a substantial performance of it according to its terms, a breach by the defendant, and the facts showing the amount he is entitled to recover. A general denial by defendant puts in issue all of these allegations. The burden is then cast upon the plaintiff to establish all of them

> by substantial evidence. If, for instance, he fails to establish the contract alleged, he fails to make out a cause of action (Kalispell Liquor & Tobacco Co. v. McGovern, 33 Mont. 394, 84 Pac. 709), and the defendant is entitled to a non-suit. So the defendant under his general denial, may introduce any evidence which tends to show that he did not enter into the contract, or that he made a contract different in one or more substantial particulars from the alleged, or that the plaintiff has failed to fulfill the obligations assumed by him therein according to its terms, or any other fact, which tends to destroy, not to avoid, the cause of action alleged."
>
> Chealey v. Purdy et al., 54 Mont. 489.

If the judgment now before the court is invalid as to Gaido and Tamietti, it follows as a matter, of course, that the errors above complained of are without substance.

Complaint is made that the so called release was without consideration, but the evidence submitted on this issue was submitted to the jury under proper instructions and the jury by its verdict necessarily must have found that the release was founded upon adequate consideration, and we submit that error may not be predicated upon a question of fact which has been resolved by the jury if there be any substantial evidence to support it at all.

ASSIGNMENT OF ERROR No. 7

We submit the court properly granted a direct verdict as to the second count of the complaint. One

of the grounds urged to support of the motion for a directed verdict on the second count was that the evidence in the case discloses that any stock transaction or transactions for capital stock of the Crystal Copper Company were had with Matt W. Alderson as an individual and not as a representative of the Company. This contention is amply borne out by the evidence had at a former trial of this case. Matt W. Alderson was called as a witness on behalf of the plaintiffs (Trans. 134 et seq.), and he having died the testimony he gave at the former trial was introduced at the second trial of this cause. His testimony is positive unequivocal that he was acting as an individual and not as a representative of the company on the stock transactions (Trans. 144) and that all stock transactions were had with him in the capacity of an individual, and that it was his stock he was dealing with and not that belonging to the defendant company. A party is bound by the testimony of his own witness.

Sommerville v. Greenhood, 65 Mont. 101-120.

Furthermore, the plaintiffs utterly failed to prove any damage whatsoever on these stock transactions. Damages in such cases are governed by Statute in Montana.

> "8700. Value-How estimated in favor of buyer. In estimating damages, except as provided by the next two sections, the value of property to a buyer or owner thereof, deprived of its possession, is deemed to be the price at

which he might have bought an equivalent thing in the market nearest to place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded as would suffice with reasonable diligence, for him to make such a purchase."

Sec. 8700 Revised Codes of Montana 1921.

"8674. Breach of agreement to sell personal property not paid for, The detriment caused by the breach of a seller's agreement to deliver personal property, the price of which has not been fully paid in advance, is deemed to be the execess, if any, of the value of the property to the buyer over the amount which would have been due to the seller under the contract, if it had been fulfilled."

Sec. 8674 Revised Codese of Montana, 1921.

It is plain that the plaintiffs did not bring themselves within the provision of either of these two sections in the matter of proof, hence the court's action in granting a directed verdict on the second count was doubly justifiable.

Respectfully submitted,

WALKER & WALKER
and C. S. WAGNER